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NO. 84-495

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

RICHARD THORNBURGH

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

ALAN ERNEST
P.O. BOX 2471
WASHINGTON, D.C. 20013
(703) 435-1460

COUNSEL FOR MOVANT

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem, for the purpose of defending their right to life under the U.S. Constitution.

INTEREST OF COUNSEL

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His interest is to defend the constitutional right to life of children unborn and born alive. The parties have not done this.

This is effectively a motion to allow retained counsel to represent the victims being killed, since there will be no expense to this Court, or to the taxpayers.

SUMMARY OF ARGUMENT

Roe v. Wade is void, because the Court decreed deliberate killings to be "liberty"

which had been democratically defined to be "murder" since long before the adoption of the Fourteenth Amendment.

The decree that "MASS MURDER IS LIBERTY" is the ultimate lawless act.

Since Roe v. Wade is void, this disposes of all the issues raised by the parties.

The victims being killed are entitled by the U.S. Constitution to be especially represented by counsel (no cost to taxpayers) to defend their right to life under the U.S. Constitution.

When judges decree that "MASS MURDER IS LIBERTY," and then maintain the killings by refusing to allow counsel to represent the victims, then it cannot be pretended that it is any longer the government of the United States, or any government of Constitution and laws.

The amicus curiae brief of the Legal Defense Fund For Unborn Children is incorporated herein by reference.

ARGUMENT

I.
ROE v. WADE IS VOID, BECAUSE THE SUPREME COURT HITLER-LIKE DECREED KILLINGS TO BE "LIBERTY" WHICH HAD BEEN DEMOCRATICALLY DEFINED TO BE "MURDER." THE DECREE THAT "MASS MURDER IS LIBERTY" IS THE ULTIMATE LAWLESS JUDICIAL ACT.

In Roe v. Wade, the Supreme Court decreed killings to be "liberty" which had been democratically defined to be "murder" since long before adoption of the Fourteenth Amendment.1

1./ When the Fourteenth Amendment was adopted, an abortion was murder if the child was "born alive." And a child could be "born alive" long before viability.

A. The English Common Law

The English common law, as stated in the works of Coke, (3 Inst. 50), Hawkins, (1 Hawkins Ch. 13, s. 16) and Blackstone, (4 Bl. Com. 198) defined an abortion, in which a "quick" child died after being "born alive," to be "murder."

Thus, under the common law, an abortion of an unviable child, a child too immature to survive outside the womb, who died after being born alive, was "so horrible an offense" and "this is murder." 3 Inst. 50.

Regina v. West, 2 C & K 784 (1848) followed Coke, Hawkins, and Blackstone, and ruled that an abortion was murder if the child

In 1857, the American Medical Association began a two year study of all the abortion laws in the United States. The 1859 report stated the law of murder throughout the United States, as follows:

> "If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it in a situation in which it cannot live, is guilty of murder." Reported in A.S. Taylor, infra page 7. (emphasis added)

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was born alive, even though the child died because it was too immature to survive outside the womb.

The indictment for murder alleged that the defendant had inserted a "certain pin ... upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Regina v. West, 2 C & K at 784-85. The child died shortly afterward. A "medical witness" had testified:

"[I]t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any

Yet, in 1973, this is the very killing which the U.S. Supreme Court decreed to be "liberty."

In the plainest terms, the U.S. Supreme Court decreed: "MASS MURDER IS LIBERTY."

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considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K at 785.

The judge, relying on Coke and Blackstone, instructed the jury that if the child were "born alive," the abortion was murder, even though the child were not viable:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.... I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes the child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Regina v. West, 2 C & K at 788.

The case of Regina v. West, supra, was

Many people would be astonished to learn that this case for the unborn is the very case they would have to present for themselves if their own right to life were challenged in a federal court.

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cited by the leading English writers as the correct statement of the law of murder. See, 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516 (Penrose Am. ed. 6th ed. 1866). An abortion which resulted in an unviable child being born alive was murder.

B. THE AMERICAN LAW OF MURDER IN 1868

The common law is the dictionary for the state and federal homicide statutes; American courts used it to construe the meaning of their murder statutes. Hamilton v. United States, 26 App. D.C. 382 (1905); Clarke v. State, 117 Ala. 1 (1898).

By the time the Fourteenth Amendment was adopted in 1868, the leading American legal authorities had specifically cited Regina v. West, supra, as the correct statement of the law of murder.

As Wharton explained the law, A Treatise on

For example, take almost any group of persons, such as the insane, or invalids, or Jews. Suppose it were claimed in federal court that it is "liberty" to deliberately kill members of these groups, as well as the unborn.

What factual, non-argumentative evidence

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the Law of Homicide in the United States 93 (1855):

"If a person intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

American authorities agreed that this was the correct statement of the law of murder. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, Manual of Medical Jurisprudence 462, 517 (Penrose Am. ed. 6th ed. 1866). This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.

C. THE LAW OF MURDER AND THE MEANING OF THE FOURTEENTH AMENDMENT

If the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant from its mother's

could be found to establish their right to life under the U.S. Constitution?

As the case for the unborn shows, it would do no good to object that no one ever heard of a "liberty" to deliberately kill the insane, or invalids, or Jews - or to object that such killings had thereto been defined as criminal.

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womb and leaving it to die, as murder, then it is certain that they did not intend to exclude the lives of these children from the protection of the Fourteenth Amendment so they could be deliberately killed with impunity from criminal statutes.

If the people who framed and adopted the Amendment had condemned the deliberate killing of Jews to be murder, it is certain that they did not intend to exclude Jews from the protection of the Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes. Changing the names of the victims does not change the legal result.

But by seizing upon viability, the Supreme Court decreed the same killing to be "liberty" which the American people had universally defined to be "murder." It is a naked decree without any investigation whatever into the law of murder. In its ignorance, the Court decreed: "Mass Murder is Liberty."

Since the universal words "any person" in

And the Fifth and Fourteenth Amendments merely state that they protect the life of "any person." So, as with the unborn, the Amendments do not expressly refer to the insane, or invalids, or Jews; and their legislative histories do not appear to specifically refer to the insane, or invalids, or Jews.

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the Fourteenth Amendment must include all persons whose lives were protected by the law of murder when the Amendment was adopted, the lives of these children were specifically guaranteed by the Amendment. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, then the lives of these children are still protected by the Fourteenth Amendment. Roe v. Wade is void.

D. THE HYSTEROTOMY ABORTION UNDER ROE v. WADE

A common way to perform abortions under Roe v. Wade is by hysterotomy. Commonwealth v. Edelin, 359 N.E. 2d 4 (Mass. 1976). A hysterotomy is essentially a caesarean, in which a live but unviable child is taken from the womb and left to die. HEARINGS ON THE PROPOSED CONSTITUTIONAL AMENDMENTS ON ABORTION, BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES,

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; and their legislative histories, to the extent they have any, do not appear to specifically refer to these groups.

The principle in the Declaration of

94th Cong., 2d Sess., Ser. 46, Part 1, at 391 (1976).

As established by medical testimony at these 1976 House abortion hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive." Id., at 397.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder.

E. ROE v. WADE AND MISTAKE OF LAW

The constitutional provisions against ex post facto laws do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1913). And mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed 1969). The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft #4, Comments Sec. 2.04, at 138.

Since Roe v. Wade is a mistake of law, mass murder is being perpetrated in the United

Independence, that all people are "created" equal, and endowed with an unalienable right to life, having been sneered out of court in Roe v. Wade, now provides no assurance for anyone. The Court so perverted the Declaration of Independence as to amount to just this: "All men are created equal, except those created to be murdered for the convenience of others."

States under guise of law. The Roe v. Wade hysterotomy killings, by definition under the law of murder when the Fourteenth Amendment was adopted, and thus also constitutional law, violate the murder statutes throughout the United States.

The Supreme Court decreed mass murder to be liberty without any examination of the law of murder; it was a naked decree. And as Abraham Lincoln warned, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him. 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. 3 Wharton's Criminal Law and Procedure 673 (12th ed. 1957).

And year after year the U.S. Supreme Court has deliberately adhered to its decree that

So, what factual, non-argumentative evidence is there for the insane, or invalids, or Jews to protect themselves from a judicial decree that it is "liberty" to deliberately kill them with impunity from criminal statutes?

"Mass Murder is Liberty" in the very teeth of challenges that these children were being murdered in violation of the Constitution and laws of the United States, and of the States. See amicus curiae brief of The Legal Defense Fund for Unborn Children, filed in Akron v. Akron Center For Reproductive Health, 462 U.S. 416 (1983).

This is deliberation and premeditation unparalleled in the legal history of the world. The Justices responsible for these killing may be facing the death penalty in very many states.

It may be that the judges responsible for these murders did not believe that they were breaking the law. But, as Justice Oliver Wendell Holmes once wrote: "Ignorance of the law is no excuse for breaking it....It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (Little Brown paperback 1963).

Roe v. Wade is not going to protect one

The case for the unborn is the case for many others; it is this same body of factual evidence which many people must ultimately rely upon to establish that their right to life is protected by the U.S. Constitution.

If the people who framed and adopted the Fourteenth Amendment had condemned the deliberate killing of Jews to be "murder," then it is certain that they did not intend to exclude the lives of Jews from the

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single judge from the law of murder, because it is a mistake of law. Mass murder is not liberty. These children were murdered in violation of the Constitution and positive criminal statutes.

F. CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

Since the U.S. Constitution is "the supreme law of the land," and the evidence proves that the lives of these children are protected by the U.S. Constitution, Roe v. Wade is void.

protection of the U.S. Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes.

And merely changing the names of the victims would not change this conclusion.

Since the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant, whether viable or not, from its mother's womb and leaving it to die to be "murder," it is certain that the framers did not intend the Amendment to create a "liberty" to deliberately kill these children with impunity from criminal statutes. It is certain that the lives of these children are protected by the U.S. Constitution.

And since the right to life protected by the Constitution does not just disappear with time, as whitewash weathers off an aging fence, it is certain that the lives of these children are still protected by

the U.S. Constitution. And since the Constitution is the "supreme law of the land," it is certain that Roe v. Wade is void; it is not law.

The thousands of "born alive" abortions since 1973 can be prosecuted as murder.

If the Court had decreed it "liberty" to deliberately kill Jews, it would rightly be denounced as murder. Judges may have more sympathy for other victims, but changing the names of the victims from "Jew" to "unborn" will not change the legal result.

In his novel "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, yet, the U.S. Supreme Court has defrauded the American people into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

When judges decree that "MASS MURDER IS LIBERTY," then it can not be pretended that

it is any longer the government of the United States - or any government of constitution and laws.

Abraham Lincoln ridiculed the Dred Scott decision by reducing it to its plainest terms: "If any one man, choose to enslave another, no third man shall be permitted to object."2 In Roe v. Wade, the Court invented an even more astonishing falsehood, "If any one man, choose to murder another, no third man shall be permitted to object."

The U.S. Supreme Court has Hitler-like asserted to legalize mass murder. By

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2./ 2 Collected Works of Abraham Lincoln 462 (Basler ed. 1953). In Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 451 (1857), the U.S. Supreme Court held that the word "person," as used in the Constitution, did not include Negroes. While the Court did not assert a "liberty" to deliberately kill Negroes, the Court did rule that "the right to property in a slave is distinctly and expressly affirmed in the Constitution," and Congress could not prohibit slavery in the federal territories.

changing the names of the victims, the Court has duplicated the conduct of "the supreme judge" of Nazi Germany.[3]

The evidence shows that the U.S. Supreme Court is committing mass murder under the guise of law; the dagger of the assassin has been concealed beneath the robe of the jurist. Roe v. Wade is void.

3./ The Nuremberg court described how Hitler was "the supreme judge" of Nazi Germany. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011 (1951). This "supreme judge" decreed deliberate killings to be legal which had been defined as criminal. At Nuremberg, the Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted within the authority of the decrees of "the supreme judge." United States v. Altstoetter, supra, 983-85. But the Nuremberg Court held, "The dagger of the assassin was concealed beneath the robe of the jurist." United States v. Altstoetter, supra, 985.

By changing the name of the victims from "Jew" to "unborn," the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany. But changing the name of the victims will not change the legal result. Roe v. Wade is murder.

II.
THE VICTIMS BEING KILLED BY ROE v. WADE ARE CONSTITUTIONALLY ENTITLED TO BE ESPECIALLY REPRESENTED BY COUNSEL TO DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

The victims being killed by Roe v. Wade have a constitutional right to be especially represented by a next friend, or counsel, at no cost to taxpayers, to defend their right to life under the U.S. Constitution.[1]

If the constitution would not permit a court to condemn one single Jew to death in a criminal trial, but deny assistance of

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1./ Goldberg v. Kelly, 397 U.S. 254, 268-270 (1970); In Re Gault, 387 U.S. 1 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963).

The U.S. Constitution will not permit any judge to exclude anyone from the protection of the U.S. Constitution, so the victim can be deliberately killed with impunity from criminal statutes, without assistance of counsel to defend the victim's right to life under the U.S. Constitution.

When judges decree that "MASS MURDER IS LIBERTY," and then maintain the killings by refusing to allow the victims being killed to be assisted by counsel to defend their right to life under the U.S. Constitution, then it cannot be pretended that it is any longer the government of the United States, or any government of Constitution and laws.

counsel, then neither will the Constitution permit a court to condemn all Jews in the United States to death, without counsel, by calling it a civil proceeding, and decreeing that the lives of Jews are not protected by the U.S. Constitution, and it is "liberty" to deliberately kill any or all Jews in the United States with impunity from criminal statutes.

If the Roe v. Wade process were used to decree a "liberty" to kill Jews, it would rightly be condemned as murder. By merely changing the names of the victims, this is now going on in the courts of the United States. But changing the names of the victims will not change the legal result.

The unborn have never been represented by counsel in the entire Roe v. Wade process. The unborn have a right under the U.S. Constitution to be especially represented by counsel to defend their right to life under the U.S. Constitution.

III.

THE U.S. SUPREME COURT HAS DECREED "MASS MURDER IS LIBERTY," AND IT HAS MAINTAINED THE KILLINGS, YEAR AFTER YEAR, BY REFUSING TO ALLOW COUNSEL TO REPRESENT THE VICTIMS BEING KILLED. THE HUMAN MIND CANNOT IMAGINE A MORE CORRUPT JUDICIAL PROCESS.

When judges willfully deprive the unborn of the right of assistance of counsel to defend their right to life under the U.S. Constitution, it is not only unconstitutional, it is criminal.[1]

The human mind could not imagine a more corrupt judicial process:

(1) judges decree that "Mass Murder is Liberty," and

(2) the judges effect the killings by refusing to allow counsel to represent the victims to be killed; and

(3) the judges maintain the killings year after year, in the teeth of challenge, by repeatedly refusing to allow counsel

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1./ "Even judges ... could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242." Imbler v. Pachtman, 424 U.S. 409 (1976).

to represent the victims being killed to defend their right to life under the U.S. Constitution.

If this process were used to decree it "liberty" to deliberately kill Jews, it would rightly be condemned as murder. Judges might have more sympathy for another category of victims, but changing the name of the victims from "Jew" to "unborn" will not change the legal result.

Now a lawyer must try to prove that the most corrupt judicial process, which the human mind can imagine, is wrong.

But the lawyer cannot even be heard, because the Court will not allow counsel to represent the victims being killed and defend their right to life under the U.S. Constitution.

The U.S. Supreme Court is willfully maintaining these killings by refusing to allow truth to work in its Court. This is unconstitutional and criminal.

A 1

The photograph, supra A-1, shows a second stage abortion by prostaglandin. Such abortions not uncommonly result in the child being born alive.[1] This Court would be guilty of murder for such killing. There have been thousands of such killings under Roe v. Wade; and witnesses live to tell.

If the child were born dead, the Court would be guilty of criminal extermination.[2]

As the Court studies the face of this victim of Roe v. Wade, let it contemplate that a government of laws shall be restored, and call the killers to account.

1./ Floyd v. Anders, 440 F. Supp. 535, 538 (1977). There are about 140,000 second stage abortions each year. All the common second stage abortion techniques - hysterotomy, prostaglandin, and even salt poisoning - can result in the child being born alive. Jefferies and Edmonds, Abortion: The Dreaded Complication, The Philadelphia Inquirer, August 2, 1981.

2./ Since the universal words "any person," as used in the Fifth and Fourteenth Amendments, do include the unborn, their lives are also protected from judicial extermination by 18 U.S.C. (242.